MOHD. TAJUDDIN BIN SALLEH

v.

MOKHARI BIN A/L MURGIS & ANOR.

HIGH COURT, TAIPING
DATO' HJ. ABDUL MALIK BIN HJ. ISHAK JC
[CIVIL APPEAL NO. 12-6-92 (92)]
15 MARCH 1993

TORT: Negligence - Motor accident - Trial Court found appellant/plaintiff wholly responsible for the collision - Silent evidence - Sketch plan with key shows position of both vehicles after accident - Encroachment - Crucial issue was point of impact between two vehicles - Relevant facts to be mentioned in police reports.

This was an appeal against the decision of the Sessions Court, Kuala Kangsar which dismissed the appellant/plaintiff's claim and found the appellant/plaintiff wholly to be blamed for the collision. The appellant/plaintiff being dissatisfied appealed against the decision on liability.

Held:

[1] The version of the first respondent as supported by the silent evidence was accepted by the trial Court and that version would certainly not be something which would be inherently improbable.

[2] The trial Court heard and saw the witnesses and was in a better position to determine their credibility and reliability and had made proper use of that advantage in considering the evidence as adduced. In the circumstances, the finding of fact by the trial Court should not be upset.

[Appeal dismissed with costs. Judgment of Sessions Court confirmed].

Cases referred to:

Yahaya bin Mohamad v. Chin Tuan Nam [1975] 2 MLJ 117 ***(foll)***

Mohamed Salleh bin Awang & Anor. v. Low Han Leong & Anor. [1982] 1 MLJ 82 ***(foll)***

Chai Kah Sim v. Ishak bin Saad [1986] 1 CLJ 537/ [1986] 2 MLJ 132 SC ***(foll)***

Dawson v. Murex Ltd. [1942] All ER 483 ***(dist)***

Wong Ah Sing v. Government of Singapore & Ors. [1968] 1 MLJ 1, 2 ***(refd)***

Haron v. Macaulay [1969] 1 MLJ 169 FC ***(refd)***

Nicholas Arthur Nock v. Mohamed Ali bin Suleiman & Anor. [1976] 1 MLJ 252 CA ***(refd)***
Abdul Mokhti bin Haji Ahmad v. Idris bin Ibrahim [1977] 2 MLJ 85 ***(refd)***
Wan Norsiah binte Wan Abdullah v. Che Haron bin Che Daud [1980] MLJ 237 ***(refd)***
Multar v. Lim Kim Chet & Anor. [1982] CLJ 107/ [1982] 1 MLJ 184 FC ***(refd)***
Ong Kim Hai v. Kusaini bin Surip [1984] 2 CLJ 281/[1984] 2 MLJ 285 FC ***(refd)***
Udhayakumar s/o Vadivelu & Anor. v. Chin Kon Tai [1986] 1 MLJ lii ***(refd)***

Legislation referred to:
Factories Act 1937 (UK)

For the appellant - Manjeet Singh; M/s. Manjeet & Associates
For the respondents - Chun; M/s. Chong & Poh

JUDGMENT

Hj. Abdul Malik Bin Hj. Ishak JC:
This is an appeal against the decision of the Sessions Court Kuala Kangsar, Perak ("the trial Court"). The appellant was the driver of motorcar WS 7660 ("the motorcar") which was involved in an accident with motor lorry CA 8317 ("the lorry") driven by the first respondent at the 29 milestone Jalan Kuala Kangsar/ Lenggong on 16 November 1986 at about 12.00 p.m. The second respondent was the owner of the lorry. The trial Court found the appellant/plaintiff totally to be blamed and accordingly assessed damages. The appellant being dissatisfied appealed against the decision on liability only but not against the decision on the quantum of damages.

The parties gave conflicting versions of the manner in which the accident occurred as noted by the trial Court. This is, of course, not uncommon in motor accident cases that come up before the Courts, where each party trys to throw the blame on the other. However, the undisputed facts as accepted by the trial Court were that the two vehicles were approaching each other from the opposite direction. The motorcar was proceeding from Ipoh/Kati towards Lenggong and the lorry was travelling from Lenggong towards Ipoh/Kati. The appellant was negotiating a right hand bend and the first respondent a left hand bend when the accident occurred. Immediately after the collision, the motorcar came to a stop over the left edge of its side of the road facing towards Lenggong. The lorry was lying on the left side of its side of the road facing Ipoh/Kati.

According to the appellant (who had just obtained his driving licence 6 to 7 months before the accident), he was driving the motorcar at a speed of 30 kilometers per hour from Kuala Kangsar to Lenggong (meaning from Ipoh/Kati to Lenggong). On arrival at the scene of the accident and while negotiating a right hand bend (the condition of the road was slightly hilly), he saw a lorry coming from the opposite direction encroaching onto his side of the road. The appellant took evasive action by turning to the right and entered the path of the respondent since on the left side of the road there was a slight drop. It was when half of the appellant's motorcar had entered the path of the first respondent and simultaneously the first respondent drove the lorry and returned to his side of the road that the accident took place. According to the appellant at that time the accident was unavoidable and it occurred on the side of the first respondent's path. The appellant told the trial Court that he was not positive whether the first respondent drove the lorry at a fast speed or otherwise immediately before the accident took place. The appellant's police report vide Kati report No. 494/86 dated 17 November 1986 was tendered and marked as exhibit P3.

Under cross-examination the appellant stated that there were three other lorries in front of the first respondent's lorry before the accident. He stated that his speed was not more than 40 kilometers per hour at that time. The appellant further stated that before he saw the first respondent's lorry he saw another lorry in front of the first respondent's lorry and at that time the first respondent's lorry was about 30 feet from that lorry. By that time the first respondent's lorry had already encroached on the appellant's side of the road. According to the appellant when the first respondent's lorry encroached on his side of the road there was still another lorry in front of the first respondent's lorry and it was at that time the appellant swerved to the right and he then stated that he did not know on which side of the road the accident took place.

Under re-examination the appellant stated that he swerved to the right even though there was another lorry in front of the first respondent's lorry.

To a question by the trial Court, the appellant stated that the accident took place on the bend to his right side.

On the other hand, according to the first respondent on the date and time of the accident, he was on his way to Kuala Lumpur from Grik (meaning from Lenggong to Ipoh/Kati). He stated that when he first saw the first respondent's motorcar, there was another lorry in front of him. That lorry was from the same company and they were travelling in a convoy at a distance of 40 feet from one another. The first respondent stated that he stopped his lorry by the side of the road (on his left side) when he saw the appellant's motorcar coming from the opposite direction at a fast speed in an uncontrollable manner (dalam keadaan terumbang ambing) because he was afraid that the first respondent's motorcar might collide with the lorry that was in front of him. According to the first respondent, this happened at a bend and the appellant's motorcar encroached onto the side of the first respondent's path thereby colliding into the first respondent's lorry by the side of the road. The first respondent stated that he was travelling at 40 kilometres per hour on the hill slope and there was a bend along that stretch. The first respondent's police report vide Kati report No: 492/86 dated 16 November 1986 was tendered and marked as exhibit D4.

Under cross-examination, the first respondent marked "X" on the sketch plan as the point of impact and stated that the accident took place not at the bend of that stretch of the road.

In re-examination the first respondent stated that he could see oncoming vehicles from the opposite direction.

To a question by the trial Court, the first respondent confirmed the positions of the vehicles immediately after the accident as shown in the sketch plan.

In the light of the contradictory versions the trial Court took into consideration the other available evidence (the admitted documents), *viz,* the key and the sketch plan of the scene showing the positions of the two vehicles after the accident and the police reports lodged by both parties to assist him in making his finding. I am of the considered view, that the trial Court has applied the correct test. (see *Yahaya bin Mohamad v. Chin Tuan Nam* [1975] 2 MLJ 117, *Mohamed Salleh bin Awang & Anor. v. Low Han Leong & Anor.* [1982] 1 MLJ 82 and *Chai Kah Sim v. Ishak bin Saad* [1986] 2 MLJ 132 SC).

From the sketch plan, two spots of broken glasses at "R" and "S" could be seen scattered on the first respondent's side of the road. The damage to the motorcar was listed in the key as, *inter alia,* both headlamps and windscreen broken. While the damage to the lorry was, *inter alia,* its right headlamp broken (also itemised in the key). Again in the sketch plan two prominent brake marks from the respondents' lorry measuring 12 feet 8 inches for its right wheel and 12 feet 3 inches for its left wheel could clearly be seen on the first respondent's side of the road more towards the left side. On the other hand, on the appellant's side of the road not a single mark could be seen on the sketch plan except the position of the appellant's motorcar on the left edge of the road. Confronted with this silent evidence, the trial Court found that the accident could likely have taken place at point "R" in the sketch plan, and that would be on the first respondent's side of the road.

In short, the trial Court concluded from the broken glasses on the road, that the appellant had encroached onto the first respondent's side of the road and thereby caused the accident.

It was submitted by the learned Counsel for the appellant that the trial Court erred in arriving at that conclusion on the ground that he had failed to take into account as to why the appellant had encroached onto the path of the first respondent. And that the appellant had given evidence which showed that it was probable that the accident had happened in the manner as described by the appellant, so submitted the learned Counsel for the appellant. *Dawson v. Murex Ltd.* [1942] All ER 483 was cited to support learned Counsel's submission. With respect, the facts in that case are poles apart from the instant appeal. That case was in regard to the Factories Act 1937 which imposed upon the appellants certain obligations with regard to the provision of safe apparatus, plant, etc., and it was held that they could not excuse themselves from the performance of those obligations by saying that the use of inadequate or dangerous plant was due to the fact that a foreman or a supervisor failed in his duty to see that it was not used.

Now, in the instant appeal the crucial issue was the point of impact between the two vehicles. The appellant explained that he

encroached onto the path of the first respondent so as to avoid a collision with the first respondent who had at that time encroached into the appellant's side of the road. The first respondent drove a lorry with a trailer attached at its rear. The lorry measured 33 feet by 9 inches in length and the trailer measured 18 feet by 7 inches in length. Its width measured 7 feet by 10 inches (see the key). Certainly the lorry was not small. It was huge. Now, if the version of the appellant is to be accepted, this would mean that when the appellant swerved onto the path of the first respondent in order to avoid the first respondent's lorry that was encroaching onto the appellant's path, the appellant in swerving onto the path of the first respondent would have collided with the other lorry which was directly in front of the first respondent's lorry. Alternatively by virtue of its formidable size, the first respondent's lorry would take quite some time to come back to its side of the road and in so doing the collision with the appellant's motorcar would not be frontal but sideways more to the left side of the motorcar. However, the damages to the appellant's motorcar depicted a different tale, it showed that the damages were all focussed on its front portion not on its side (see the damages itemised in the key).

Again if one were to accept the appellant's version that it was the first respondent's lorry that first encroached onto the path of appellant thereby necessitating the appellant to swerve his motorcar onto the path of the first respondent, yet the question of the appellant's encroachment was not stated at all in the appellant's police report. The appellant's police report merely stated that the accident occurred when the first respondent's lorry in the course of overtaking another lorry in front of it had encroached onto the appellant's path thereby causing the accident. The police report gave the impression that the accident occurred on the appellant's side of the road. Another startling difference would be this. In the appellant's police report it was stated that there were three other lorries in front of the first respondent and that after the three lorries had gone past the appellant, the first respondent's lorry tried to overtake and encroached onto the path of the appellant thereby causing the accident. In his oral testimony the appellant merely stated that there was one other lorry in front of the first respondent's lorry.

If the appellant's version is to be accepted it should be reflected in his police report. Such failure would be fatal to the appellant's case. The Courts have consistently been emphasising on the need to mention relevant facts in one's police report - (see *Wong Ah Sing v Government of Singapore & Ors*. [1968] 1 MLJ 1, 2, *Haron v Macaulay* [1969] 1 MLJ 169 FC, *Nicholas Arthur Nock v Mohamed Ali bin Suleiman & Anor*. [1976] 1 MLJ 252 CA, *Abdul Mokhti bin Haji Ahmad v. Idris bin Ibrahim* [1977] 2 MLJ 85 and *Wan Norsiah binte Wan Abdullah v. Che Haron bin Che Daud* [1980] MLJ 237). I cannot therefore accept the appellant's proposition in the light of all the surrounding circumstances.

The trial Court rightly concluded that the motorcar at a fast and uncontrollable manner had encroached onto the path of the lorry. This is also supported by the averment in the statement of defence of the respondents where it was alleged, *inter alia*, in the particulars of negligence that the appellant "encroached and knocked into" the first respondent's vehicle. Obviously when the first respondent saw this danger and being perplexed he had no choice but to swerve to his left (all along the first respondent was on his side of the road and not encroaching) and applied his brakes in an attempt to avoid the accident but failed. In my considered view, when the first respondent is perplexed or agitated when exposed to danger by the wrongful act of the appellant, it would be sufficient if he could show as much judgment and control in attempting to avoid the accident as may be reasonably expected of him in the circumstances.

The version of the first respondent as supported by the silent evidence was accepted by the trial Court. That version would certainly not be something which would be inherently improbable. The trial Court heard and saw the witnesses and was in a better position to determine their credibility and reliability. The first respondent was cross-examined on the matter in his presence. He had made proper use of that advantage in considering the evidence as adduced. In the circumstances, I am not inclined to upset his finding of fact.

One more point needs mention.

In dismissing the appellant/plaintiff's claim, the trial Court proceeded rightly to assess provisionally the damages. (see *Multar v. Lim Kim Chet & Anor.* [1982] 1 MLJ 184 FC and *Ong Kim Hai v. Kusaini bin Surip* [1984] 2 MLJ 285 FC). Thus, for "traumatic disorganisation of the left eyeball with traumatic cataract and macular scarring leading to 100% permanent loss of vision in the left eye" the trial Court rightly awarded a sum of RM30,000 using *Udhayakumar s/o Vadivelu & Anor. v. Chin Kon Tai* [1986] I MLJ lii as a comparable (where Peh Swee Chin J (as he then was) awarded RM25,000 in connection with loss of sight of one eye). I must say, taking into account the inflationary rate, that I entirely agree with this award. At any rate, this appeal as stated earlier is only in regard to liability.

In the event the appellant's appeal is dismissed with costs and the judgment of the Court below is confirmed.

Appeal dismissed.